No. 98-1255

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL MARTINEZ-SALAZAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant is entitled to automatic reversal of his conviction when he uses a peremptory challenge to remove a potential juror whom the district court erroneously failed to remove for cause, and he ultimately exhausts his remaining peremptory challenges.

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 146 F.3d 653.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1998. A petition for rehearing was denied on October 7, 1998 (App., *infra*, 20a-21a). On January 4, 1999, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including

February 4, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

Section 2111 of Title 28 of the United States Code provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 24(b) of the Federal Rules of Criminal Procedure provides:

> If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

Rule 52(a) of the Federal Rules of Criminal Procedure provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, respondent Abel Martinez-Salazar was found guilty of conspiracy to possess heroin with intent to distribute it (21 U.S.C. 846), possession of heroin with intent to distribute it (21 U.S.C. 841(a)(1)),

and using or carrying a firearm during and in relation to a drug trafficking offense (18 U.S.C. 924(c)(1)). App., *infra*, 2a. He was sentenced to 123 months' imprisonment. Gov't C.A. Br. 3-4. Respondent appealed, and the court of appeals found an impairment of his right of peremptory challenges that, it held, "require[d] automatic reversal." App., *infra*, 3a.

1. Respondent and a co-defendant were tried and convicted on drug and weapons charges. Before trial, prospective jurors filled out a jury questionnaire. App., *infra*, 3a. A potential juror named Don Gilbert indicated on his questionnaire that he would favor the prosecution. *Ibid.* The district court subsequently advised the potential jurors, as a group, that the indictment is not evidence, that the government bears the burden of proof beyond a reasonable doubt, that defendants are presumed innocent, and that the jury is to determine guilt or innocence based on the evidence and the law as explained to it by the court. 12/7/93 Tr. 38-41. Gilbert gave no response when the district court asked whether any potential juror disagreed with those legal principles. *Id.* at 40, 42. Gilbert also gave no response when the district court asked whether any juror believed that he could not serve fairly and impartially. *Id.* at 44.

The district court also questioned Gilbert individually. During that questioning Gilbert indicated that "all things being equal, [he] would probably tend to favor the prosecution," App., *infra*, 4a, that he assumed that "people are on trial because they did something wrong," *id.* at 5a, and that he did not know whether a juror holding his opinions could give the defendants a fair trial, *id.* at 4a. Gilbert also indicated, however, that he did not disagree with the principle that the government bore the burden of proof beyond a reasonable doubt,

and that he understood in theory that defendants are presumed innocent. *Id.* at 4a-5a.

Respondent and his co-defendant challenged Gilbert for cause. The district court denied the challenge on the ground that Gilbert had indicated that he would be able to follow the court's instructions. 12/7/93 Tr. 102-103. Respondent and his co-defendant were jointly allotted ten peremptory challenges for use in the selection of regular jurors, and an additional challenge for use in the selection of the alternate juror. App., *infra*, 3a. The government was allotted six peremptory challenges for use in the selection of regular jurors, and an additional challenge for use in the selection of an alternate. 12/7/93 Tr. 107. The defense used one peremptory challenge to remove Gilbert, and eventually exhausted its allotted eleven challenges. App., *infra*, 6a.

2. The court of appeals reversed respondent's convictions based on the impairment of respondent's right of peremptory challenge. App., *infra*, 1a-19a. It first held that the district court abused its discretion by refusing to excuse Gilbert for cause. *Id.* at 7a-8a. Relying on this Court's decision in *Ross* v. *Oklahoma*, 487 U.S. 81 (1988), the court held that the error did not constitute a violation of the Sixth Amendment, because Gilbert did not actually sit on the jury. App., *infra*, 9a. The court held, however, that the error amounted to a violation of respondent's right to due process under the Fifth Amendment. The court reasoned that the defense was forced to use a peremptory challenge to remove a juror who should have been removed for cause, and that it was thereby effectively denied a peremptory chal-

lenge to which it was entitled by law.[1] *Id.* at 9a-14a. The court held that, because respondent was denied the right to use his full complement of peremptory challenges as he saw fit, automatic reversal was required without any inquiry into harmless error. *Id.* at 14a-15a.

Judge Rymer dissented. App., *infra*, 15a-19a. She concluded that the loss of a peremptory challenge does not amount to a constitutional violation. *Id.* at 15a. In any event, Judge Rymer explained, respondent never suggested to the district court that he wanted to strike some other juror with the peremptory challenge that was instead used to remove Gilbert. *Id.* at 16a. Judge Rymer therefore concluded that there was no indication that respondent was adversely affected by the district court's refusal to remove Gilbert for cause. *Ibid.* Judge Rymer further stated that respondent could obtain relief only if he could establish plain error, because he had not adequately preserved an objection based on the denial of his right to exercise peremptory challenges. *Id.* at 16a-17a. Finally, Judge Rymer concluded that respondent had failed to demonstrate plain error, because he could show no prejudice and because it was far from clear that the use of a peremptory challenge to remove a juror who should have been excluded for cause amounts to a due-process violation, or even a denial of the right to peremptory challenges provided by Rule 24

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[1] In a brief to the panel, the government conceded that it violates due process to require a defendant to use a peremptory challenge to remove a juror who should have been removed for cause. Gov't C.A. Supp. Br. 9-12. The court of appeals did not rely on that concession, but instead "independently conclude[d]" that respondent's due-process rights had been violated. App., *infra*, 9a n.4. In its petition for rehearing, with suggestion for rehearing en banc, the government retracted that concession by arguing that no due-process violation occurs in that situation. Pet. for Reh'g 9-10.

of the Federal Rules of Criminal Procedure. App., *infra*, 17a-18a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that, when a defendant uses a peremptory challenge to remove a juror who should have been excused for cause, and he later exhausts his allotted challenges, the defendant's Fifth Amendment due-process rights have been violated and the violation compels reversal, without any inquiry into harmless error. App., *infra*, 3a. That holding creates a square conflict among the courts of appeals. The Eighth, Tenth, and Eleventh Circuits have all held that such an error does not amount to a constitutional violation and does not require reversal unless prejudice is shown. The court of appeals' holding is also incorrect. A defendant's right to exercise peremptory challenges is not of constitutional dimension, and his exhaustion of his peremptory challenges by using one to remove a juror who should properly have been removed for cause is not even a clear impairment of his rule-based rights. Morever, this Court's harmless-error cases, a federal statute, 28 U.S.C. 2111, and Federal Rule of Criminal Procedure 52(a) make clear that *all* errors in federal criminal trials are subject to harmless-error analysis. Under a proper application of harmless-error doctrine, the error in this case did not affect respondent's "substantial rights," Fed. R. Crim. P. 52(a), and did not warrant reversal.[2] Because the issue in this case is

[2] The government contended in the court of appeals that the district court did not abuse its discretion by refusing to excuse Gilbert for cause. See, *e.g.*, Gov't C.A. Supp. Br. 6-9. Because the contrary conclusion of the court of appeals does not present a legal question of general importance, the government does not seek review of that conclusion in this Court and therefore assumes for

recurring and important, the court of appeals' erroneous holding warrants this Court's review.

1. There is a square conflict among the courts of appeals about whether reversal is required when the trial court in a criminal case erroneously denies a defense motion to remove a potential juror for cause, thereby causing the defendant to use a peremptory challenge to remove that potential juror. The Ninth Circuit held in this case that if the defense later exhausts its challenges, such an error amounts to a violation of the defendant's due-process rights and requires automatic reversal. App., *infra*, 1a-19a. The Fifth Circuit has recently articulated the same principle of per se reversal (without, however, resting on a due-process theory). See *United States* v. *Hall*, 152 F.3d 381, 408 (1998) (relying on *United States* v. *Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976)), petition for cert. pending, No. 98-7510 (filed Dec. 29, 1998).

In contrast, the Eighth, Tenth, and Eleventh Circuits have held that such an error is not of constitutional dimension and does not require reversal absent a showing of prejudice—generally speaking, unless a biased juror is seated. See, *e.g.*, *United States* v. *Gibson*, 105 F.3d 1229, 1233 (8th Cir. 1997); *United States* v. *McIntyre*, 997 F.2d 687, 698 n.7 (10th Cir. 1993), cert. denied, 510 U.S. 1063 (1994); *United States* v. *Farmer*, 923 F.2d 1557, 1566 & n.20 (11th Cir. 1991).[3]

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present purposes that the district court should have excused Gilbert for cause. Cf. *United States* v. *Lane*, 474 U.S. 438, 444 n.5 (1986); *United States* v. *Hasting*, 461 U.S. 499, 506 n.4 (1983).

[3] There is a corresponding conflict among the courts of appeals in civil cases. Compare *Kirk* v. *Raymark Indus.*, 61 F.3d 147, 158-162 (3d Cir. 1995) (reversal required if civil litigant uses peremptory challenge to remove potential juror whom district court erroneously refused to remove for cause), cert. denied, 516 U.S.

Respondent's convictions would have been affirmed in any of the latter three circuits.[4]

2. The decision of the court of appeals rests on two propositions: that requiring respondent to use a peremptory challenge to remove a juror who should have been excused for cause violated his due-process rights, and that such an error can never be harmless. Both propositions are incorrect.

a. A defendant has no constitutional right to peremptory challenges; the existence of any such right is solely the product of statute or rule. *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 137 n.7 (1994); *Ross* v. *Oklahoma*, 487 U.S. 81, 88 (1988); *Stilson* v. *United States*, 250 U.S. 583, 586 (1919). In *Ross*, this Court rejected the view that a state court's erroneous refusal to remove a juror for cause, thereby requiring the defendant to use one of his peremptory challenges to remove the juror, violated the defendant's Sixth Amendment right to an impartial jury. 487 U.S. at 87-88. "So long as the

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1145 (1996), with *Getter* v. *Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995) (finding harmless error in same circumstances), cert. denied, 516 U.S. 1146 (1996).

[4] Two other courts of appeals have decided cases holding that reversal is not required when a defendant exercises a peremptory challenge to remove a potential juror who erroneously was not removed for cause. See, *e.g.*, *United States* v. *Rubin*, 37 F.3d 49, 54 (2d Cir. 1994); *United States* v. *Nururdin*, 8 F.3d 1187, 1190-1191 (7th Cir. 1993), cert. denied, 510 U.S. 1206 (1994). The law in both of those courts, however, is unclear in light of subsequent or contrary decisions. See pp. 16-17 & n.9, *infra*. Conversely, the Fourth Circuit has held that reversal is required when a defendant exercises a peremptory challenge to remove a potential juror who erroneously was not removed for cause. See *United States* v. *Rucker*, 557 F.2d 1046, 1049 (1977). Subsequent decisions make clear that the law in the Fourth Circuit is unsettled. See p. 17 n.9, *infra*.

jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.* at 88. The Court in *Ross* also concluded that requiring Ross to use a peremptory challenge to remove a juror who should have been excused for cause did not deprive Ross of his rights under the Due Process Clause. *Id.* at 89-91. The Court reached that result because the Oklahoma courts require defendants to use a peremptory challenge to rectify a trial court's error in denying a for-cause challenge, *id.* at 90, and Ross, therefore, "received all that [state] law allowed him." *Id.* at 91.

Even assuming that the federal rule is different, and that respondent's right to exercise peremptory challenges was impaired by the district court's erroneous for-cause ruling, that impairment does not amount to a violation of respondent's rights under the Due Process Clause. The right of federal criminal defendants to exercise peremptory challenges is created by federal rule, not the Constitution. Such challenges "are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial." *Georgia* v. *McCollum*, 505 U.S. 42, 57 (1992). Although the violation of a non-constitutional rule of procedure may in unusual circumstances rise to the level of a due-process violation, see, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) (denial of state-law right to adjudicatory procedures), the general rule is that such a violation does not make out a due-process claim unless the violation "results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *United States* v. *Lane*, 474 U.S. 438, 446 n.8 (1986). The district court's error in refusing to excuse a potential

juror for cause simply required the defense to use one of its peremptory challenges to achieve the same purpose; that consequence cannot reasonably be said to have deprived respondent of a fair trial.

Indeed, it is not even clear that respondent's rule-based right to exercise challenges was impaired. This Court has not decided whether, as a matter of federal law, defendants must use a peremptory strike to remove a biased juror in order to challenge on appeal a trial court's denial of a for-cause challenge. The few decisions of the courts of appeals expressly addressing the issue appear to point in different directions. Compare *Frank* v. *United States*, 42 F.2d 623, 630 (9th Cir. 1930) ("It is uniformly held that where challenge for actual bias is denied and the defendant has an opportunity to eliminate the juror by exercising a peremptory challenge and fails to do so, he cannot thereafter complain of the ruling denying his challenge unless and until he has otherwise exercised all his peremptory challenges.") (citing numerous state cases),[5] with, *e.g.*, *United States* v. *Mobley*, 656 F.2d 988, 989-990 (5th Cir. 1981) (permitting defendant to raise objection on appeal to trial court's denial of for-cause challenges where defendant exhausted peremptory challenges but did not use them against jurors whom he had challenged for cause).

The better approach is to require defendants to use their peremptory challenges to cure trial courts'

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[5] Cf. *Pickens* v. *Lockhart*, 4 F.3d 1446, 1450-1451 (8th Cir. 1993) (denying federal habeas relief because Arkansas law requires that defendants use peremptory challenges to cure trial court's erroneous denial of for-cause challenges), cert. denied, 510 U.S. 1170 (1994); *Adams* v. *Aiken*, 965 F.2d 1306, 1317-1318 (4th Cir. 1992) (same as to South Carolina law), vacated and remanded on other grounds, 511 U.S. 1001 (1994).

erroneous denials of for-cause challenges. As the Court noted in *Ross*, peremptory challenges are "a means to achieve the end of an impartial jury." 487 U.S. at 88. It is entirely consistent with that purpose to require that defendants use their peremptory "challenges to cure erroneous refusals by the trial court to excuse jurors for cause." *Id.* at 90. Such a requirement reasonably "subordinates the absolute freedom to use a peremptory challenge as one wishes to the goal of empaneling an impartial jury." *Ibid.*

In any event, a defendant's right to exercise peremptory challenges would be impaired only if the defendant wanted to remove one of the jurors who actually sat, but could not do so only because he had exhausted his peremptory challenges in removing the potential juror who should have been excused for cause. The mere fact that a defendant exhausts his peremptory challenges does not establish that his exercise of peremptory challenges has been impaired by the erroneous denial of a for-cause challenge. It may well be that the defendant in such a case is content with the jurors who are seated, and would not have exercised a peremptory challenge against any of them even if the district court had properly removed the disputed potential juror for cause. It is for that reason that many courts properly require "some objection from the defendant after the exhaustion of his peremptory challenges." *Frank*, 42 F.2d at 631. See also, *e.g.*, *id.* at 630-631 (citing numerous state cases); *Turro* v. *State*, 950 S.W.2d 390, 406 (Tex. App. 1997, pet. ref'd); *Trotter* v. *State*, 576 So. 2d 691, 692-693 (Fla. 1990); *People* v. *Schafer*, 119 P. 920, 921 (Cal. 1911) ("It is entirely consistent with the record that the 12 jurors who actually tried the case were absolutely satisfactory to defendant, and that he desired all of them to serve, and

would not have excused any one of them if he had been given the opportunity. After judgment, the contrary should not be presumed.").[6]

b. The court of appeals also erred by applying a rule of automatic reversal. The decisions of this Court, and a controlling federal statute and rule, establish that errors impairing the exercise of peremptory challenges are subject to harmless-error analysis.

Like many of the decisions that apply a rule of per se reversal to errors impairing the exercise of peremptory challenges, the decision of the court of appeals in this case relied heavily on this Court's dictum in *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965). App., *infra*, 9a-10a ("[A] denial or impairment of the right to exercise peremptory challenges 'is reversible error without a showing of prejudice.'") (quoting *Swain*, 380 U.S. at 219). *Swain* in turn relied upon a series of early decisions from this Court reversing criminal convictions on the basis of errors impairing defendants' exercise of their peremptory challenges. 380 U.S. at 219 (citing *Harrison* v. *United States*, 163 U.S. 140, 142 (1896); *Gulf, Colorado & Santa Fe Ry.* v. *Shane*, 157 U.S. 348,

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[6] In her dissent, App., *infra*, 16a, Judge Rymer concluded that respondent had failed to indicate to the district court that he would have exercised an additional peremptory challenge if one had been available. In his response to the government's petition for rehearing, respondent contended (at 4-5, 8-9, 15) that, to the contrary, the trial record indicated that respondent would have exercised an additional peremptory challenge if one had been available. That case-specific dispute, however, is irrelevant under the approach adopted by the court of appeals, which requires only that a defendant exhaust his peremptory challenges. App., *infra*, 13a. See also, *e.g.*, *Vansickel* v. *White*, No. 97-17143, 1999 WL 31457, at *12 n.2 (9th Cir. Jan. 27, 1999) (Reinhardt, J., dissenting).

351 (1895); *Lewis* v. *United States*, 146 U.S. 370, 376 (1892)).

The early decisions of this Court upon which the dictum in *Swain* rests, however, were "decided long before the adoption of Federal Rule[] of Criminal Procedure * * * 52, and prior to the enactment of the harmless-error statute, 28 U.S.C. § 2111." *Lane*, 474 U.S. at 444 (overruling similar early case holding that misjoinder of charges requires automatic reversal). Section 2111 of Title 28 provides that "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This Court has repeatedly held that *all* errors in federal criminal proceedings are subject to the harmless-error inquiry mandated by Section 2111 and Rule 52(a).[7] See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988) ("[A] federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). * * * Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."); *Lane*, 474 U.S. at 444-449 & n.11; cf. *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (rejecting claim that

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[7] If no proper objection is made in the district court, however, errors in criminal cases are reviewed under the plain-error standard of Rule 52(b). See generally *United States* v. *Olano*, 507 U.S. 725 (1993).

Court should carve out exception to Rule 52 for "structural error[s]"; Rule 52 "by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case. * * * Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, an exception which we have no authority to make.").

More specifically, this Court has relied upon Section 2111 and Federal Rule of Civil Procedure 61—a civil analogue to Rule 52(a)—in determining whether an impairment of the exercise of peremptory challenges justified granting a new trial in a civil case. See *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553 (1984) ("We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered citadels of technicality. The harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial.") (quotation marks and citations omitted). Those authorities establish that the court of appeals erred by applying a rule of per se reversal rather than conducting the inquiry, required by this Court's cases, by Section 2111, and by Rule 52(a), into whether any error affected respondent's substantial rights.

The error in this case did not affect respondent's substantial rights. In general, in order to affect substantial rights, an "error must have been prejudicial: It must have affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734

(1993);[8] see, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). The error in this case cannot reasonably be supposed to have had any such effect.

Nor does the error in the present case fall within the narrow category of fundamental constitutional errors that require reversal even if they have no effect on the outcome of trial proceedings. See, *e.g.*, *Olano*, 507 U.S. at 735 (referring to errors that deprive defendants of the "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair") (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). One example of such an error is the seating, over the defendant's objection, of an actually biased juror. See, *e.g.*, *Rose*, 478 U.S. at 578; *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966). But where no actually biased juror is seated, errors affecting the exercise of peremptory challenges will rarely, if ever, affect a substantial right of a defendant. Cf. *Ross*, 487 U.S. at 91 n.5 (noting that Ross made no claim that the "trial court repeatedly and deliberately misapplied the law in order to force [him]

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[8] When the error in question is of constitutional dimension, the government bears the burden of showing beyond a reasonable doubt that the error did not affect the outcome of trial proceedings. See *Chapman* v. *California*, 386 U.S. 18, 21-24 (1967); *United States* v. *Hasting*, 461 U.S. 499, 510-511 (1983). When the error is not of constitutional dimension, the government bears the burden of demonstrating that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946). Although the court of appeals held in the present case that the error at issue violated respondent's rights under the Due Process Clause (App., *infra*, 9a), that holding is incorrect. See pp. 8-12, *supra*.

to use his peremptory challenges to correct these errors").

It is undisputed in this case that all of the seated jurors were impartial. Even if respondent would have exercised one additional peremptory challenge against one of the jurors who sat, an error having only that consequence would not "affect [respondent's] substantial rights," 28 U.S.C. 2111, and would not justify reversal of respondent's convictions.

3. a. This case presents important and recurring issues of federal law. Defense challenges for cause are a feature of virtually every jury trial, and district courts often must rule on many such challenges in a single case. It should therefore not be surprising that the courts of appeals have frequently grappled with the question whether and in what circumstances the erroneous denial of a for-cause challenge warrants reversal of a criminal conviction. See pp. 7-8, *supra* (citing cases); see also, *e.g.*, *United States* v. *Brooks*, 161 F.3d 1240, 1246 (10th Cir. 1998); *United States* v. *Horsman*, 114 F.3d 822, 825 (8th Cir. 1997), cert. denied, 118 S. Ct. 702 (1998); *United States* v. *Cruz*, 993 F.2d 164, 168-169 (8th Cir. 1993); *United States* v. *Towne*, 870 F.2d 880, 885 (2d Cir.), cert. denied, 490 U.S. 1101 (1989); *United States* v. *Mercer*, 853 F.2d 630, 632 (8th Cir.), cert. denied, 488 U.S. 996 (1988) and 490 U.S. 1101 (1989). This Court should grant review to resolve the conflict among the courts of appeals on that question.

Granting review in this case would also provide the Court with an opportunity to shed light on a broader conflict among the courts of appeals on the question whether impairments of a criminal defendant's right to exercise peremptory challenges require automatic reversal. Like the Ninth Circuit in this case, the First,

Third, Fifth, Sixth, and Seventh Circuits have held that such errors are not subject to harmless-error analysis and therefore require automatic reversal. See, *e.g.*, *United States* v. *Serino*, 161 F.3d 91, 93 (1st Cir. 1998); *United States* v. *Ruuska*, 883 F.2d 262, 267-268 (3d Cir. 1989); *Hall*, 152 F.3d at 408 (5th Cir.); *United States* v. *McFerron*, No. 97-5161, 1998 WL 898493, at *4-*5 (6th Cir. Dec. 29, 1998); *United States* v. *Underwood*, 122 F.3d 389, 392 (7th Cir. 1997), cert. denied *sub nom. United States* v. *Messino*, 118 S. Ct. 2341 (1998); see also *United States* v. *Annigoni*, 96 F.3d 1132, 1134 (9th Cir. 1996) (en banc). As noted above, the Eighth, Tenth, and Eleventh Circuits disagree.[9] That conflict is of great significance. Peremptory challenges are exercised in every jury trial, and there are a variety of ways in which a district court might commit error affecting a defendant's exercise of peremptory challenges. The widespread disagreement among the courts of appeals on the question whether such errors invariably require reversal underscores the need for guidance from this Court.

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[9] The law in several other circuits is internally inconsistent or unclear. Compare *United States* v. *Taylor*, 92 F.3d 1313, 1325 (2d Cir. 1996) (errors impairing defendant's exercise of peremptory challenges require per se reversal) (dicta; citing *Carr* v. *Watts*, 597 F.2d 830, 833 (2d Cir. 1979)), cert. denied, 519 U.S. 1093 (1997), with *United States* v. *Rubin*, 37 F.3d 49, 54 (2d Cir. 1994) (finding error impairing defendant's exercise of peremptory challenges to be harmless). Compare also *United States* v. *Love*, 134 F.3d 595, 600-603 (4th Cir.) (error impairing exercise of peremptory challenges requires reversal only if prejudice is shown), cert. denied, 118 S. Ct. 2332 (1998), with *United States* v. *Ricks*, 802 F.2d 731, 734 (4th Cir.) (en banc) (errors impairing exercise of peremptory challenges require per se reversal), cert. denied, 479 U.S. 1009 (1986).

b. The United States filed a petition for a writ of certiorari last Term, in *United States* v. *Messino*, No. 97-1641 (cert. denied June 22, 1998), seeking resolution of the broader conflict among the courts of appeals discussed above. The respondents in *Messino* opposed certiorari, arguing that the case arose in an unusual context, *i.e.*, the failure of a district court to give the defendant accurate notice of jury-selection procedures, that there was no conflict among the courts of appeals in that particular context, and that a decision of the case might "require this Court to embark upon a fact-resolution journey." 97-1641 Br. in Opp. at 14-16, 17. We acknowledged that there was no conflicting decision involving facts like those in *Messino*, although we believed that the legal issue of harmlessness was properly presented. 97-1641 U.S. Reply Br. at 3. Whatever may be said about *Messino*, there is no question in this case that a conflict exists and that the legal issue presented is a characteristic one in peremptory-challenge litigation.

As we have explained, see p. 7, *supra*, there is a square conflict among the courts of appeals about whether reversal is required in the circumstances of this case: when the trial court in a criminal case erroneously denies a defense motion to remove a potential juror for cause, thereby causing the defendant to use a peremptory challenge to remove that potential juror. The Ninth Circuit—the largest court of appeals in the country—has now joined the Fifth Circuit in holding that such an error can never be harmless, while the Eighth, Tenth, and Eleventh Circuits have found such errors to be harmless. That conflict warrants this Court's resolution. And this case also properly raises the broader conflict among the courts of appeals on whether errors impairing the exercise of a defendant's

peremptory challenges are subject to harmless-error analysis. The erroneous denial of a defendant's for-cause challenge to a potential juror is one of the most common settings in which that issue arises, and a decision here would illuminate the proper analysis of that issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-10158

D.C. No. CR-93-00284-EHC
(District of Arizona)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ABEL MARTINEZ-SALAZAR, DEFENDANT-APPELLANT

[Argued and Submitted Dec. 16, 1994
Submission Vacated April 24, 1995
Re-argued and Submitted Nov. 21, 1996
Submission Vacated May 1, 1997
Resubmitted July 17, 1997
Decided May 28, 1998]

Before: REINHARDT, RYMER and HAWKINS,* Circuit Judges.

Opinion by Judge MICHAEL DALY HAWKINS; Partial Concurrence and Partial Dissent by Judge RYMER.

MICHAEL DALY HAWKINS, Circuit Judge

FACTS

Abel Martinez-Salazar ("Martinez-Salazar") was tried and convicted, along with a codefendant, of: (1)

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* Following the death of Circuit Judge Thomas Tang, Judge Hawkins was drawn as his replacement on the panel.

conspiracy to possess with intent to distribute heroin in violation of 21 U.S.C. § 846; (2) possession with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(i); and (3) using or carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1) ("gun count"). Martinez-Salazar appeals his convictions on all counts, claiming insufficiency of the evidence, improper jury instruction, and constitutional error in the jury selection process.

I. Sufficiency of the Evidence

Martinez-Salazar appeals the denial of his motion for acquittal as to his gun count conviction on the basis of insufficiency of the evidence.

It is clear under *Bailey v. United States*, 516 U.S. 137, 143-44, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995), that Martinez-Salazar did not "use" a firearm, in the sense of "actively employing" it, so the only issue here is whether there was sufficient evidence to support his conviction under the "carry" prong of § 924(c)(1). We held in *United States v. Staples*, 85 F.3d 461, 464 (9th Cir.), *cert. denied*, —— U.S. ——, 117 S. Ct. 318, 136 L. Ed. 2d 233 (1996), that a defendant "carries" a firearm in an automobile as long as it is "'about' his person, within reach, and immediately available for use." Here, Agent Rodriguez testified that Martinez-Salazar said that the gun was always in the car; the gun was located under the front passenger seat next to where the heroin had been; and Martinez-Salazar admitted that he sat in that seat on the way to the park meeting. The dispute at trial as to the gun count was not whether the gun was out of Martinez-Salazar's reach or otherwise unavailable to him, but whether he knew that it was in

the car. There was ample evidence to permit the jury to conclude that he did.

II. Jury Selection

Following the Supreme Court's seminal decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), courts have wrestled with the constitutional implications of jury selection in criminal cases. In *United States v. Annigoni*, 96 F.3d 1132 (9th Cir. 1996) (en banc), for example, we surveyed the history of and rationale underlying peremptory challenges and held that the erroneous denial of a peremptory challenge was fundamental error requiring automatic reversal. Here we hold that the erroneous refusal to excuse a juror for cause violates a defendant's Fifth Amendment due process rights when it forces the use of a peremptory challenge to exclude that juror and, consistent with *Annigoni*, that such a denial requires automatic reversal.

Martinez-Salazar and his codefendant were allotted ten peremptory challenges to be exercised jointly in the selection of twelve jurors. *See* Fed. R. Crim. P. 24(b). They received one additional peremptory challenge to be used in the selection of the alternate juror. *See* Fed. R. Crim. P. 24(c).

Prior to trial, the district court gave prospective jurors a written questionnaire to complete. In response to a question essentially asking if the prospective juror knew of anything that might affect his ability to serve impartially, prospective juror Don Gilbert ("juror Gilbert") wrote the following:

"I would favor the prosecution."

When the jury venire was assembled, the district court engaged in the following colloquy with Mr. Gilbert:

THE COURT: On your questionnaire, you said in question number eight, the answer: "I would favor the prosecution." Is that—are you saying that you would not be able to listen to the evidence, and decide what happened, and follow the instructions of the Court, but would simply vote for a conviction because people are charged with drug crimes?

JUROR GILBERT: No. I think what I'm saying is all things being equal, I would probably tend to favor the prosecution.

THE COURT: You understand that one of the things the jury will be told, of course, is that the prosecution, the Government has the burden of proving someone guilty beyond a reasonable doubt. And I suppose realistically, all things being equal wouldn't be beyond a reasonable doubt. Would you disagree with that?

JUROR GILBERT: No, I guess I wouldn't disagree with that.

THE COURT: I guess the important question is—and perhaps let me ask it this way. It's kind of my question. But if you were the defendants here charged with this crime, and all of the jurors on your case had your background and your opinions, do you think you'd get a fair trial?

JUROR GILBERT: I think that's a difficult question. I don't think I know the answer to that.

Martinez-Salazar's trial counsel, Mr. Garcia, then followed up by questioning juror Gilbert:

MR. GARCIA: If you were to error [sic], where would you feel more comfortable erring, in favor of the prosecutor or the defendant?

JUROR GILBERT: Well, again, not having heard any evidence in the case, I think that's kind of hard to say. I think, as I indicated on here, I would probably be more favorable to the prosecution. I suppose most people are. I mean they're predisposed. You assume that people are on trial because they did something wrong.

THE COURT: Well, you see, you heard me out there when I started the trial. That's not the general proposition. If it is, it's wrong. It's contrary to our whole system of justice. When people are accused of a crime, there's no presumption—

JUROR GILBERT: There's a—

THE COURT: —of guilty. The presumption is the other way. That's the way our system—

JUROR GILBERT: I understand that in theory.

THE COURT: Okay, all right, all right. Why don't you wait, and we'll be done here in a few minutes, okay? Thank you very much.

The record reflects no further conversations between juror Gilbert and the district court or counsel.

At the completion of the above inquiry, Martinez-Salazar's counsel challenged juror Gilbert for cause. Counsel for the government opposed the challenge, arguing, "Your honor, although he did have some opinions, he did indicate to you that he would follow your instructions and apply them accordingly." The district court then refused the requested challenge

for cause, stating: "You know about him and know his opinions. He said he did say that he could follow the instructions, and he said he—'I don't think I know what I would do,' et cetera. So I think you have reasons to challenge him if you—strike him if you choose to do that. . . ." Defendants were thus forced to use one of their peremptory challenges to strike juror Gilbert and eventually exhausted their allotted eleven.

A. History of the Appeal on this Issue

This appeal itself has something of a history. When this case first came to this Court, Martinez-Salazar's then counsel took an *Anders v. State of California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967),[1] position with respect to whether the district court's refusal to dismiss juror Gilbert created a Sixth Amendment violation. Presumably, counsel took this position because of *Ross v. Oklahoma*, 487 U.S. 81, 88,

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[1] Under *Anders*, an appointed defense counsel for an indigent on direct appeal may inform the court that all of the defendant's grounds for appeal are frivolous and may move to withdraw as counsel. Defense counsel must first file a so-called *Anders* brief "on behalf of the indigent defendant presenting the strongest arguments in favor of [his or her] client supported by citations to the record and to applicable legal authority." *United States v. Griffy*, 895 F.2d 561, 563 (9th Cir.), *appeal decided by* 904 F.2d 41 (9th Cir. 1990).

After receiving an *Anders* brief, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Anders*, 386 U.S. at 744, 87 S. Ct. 1396. If the court concludes that the appeal is frivolous, it may grant counsel's motion to withdraw and dismiss the appeal. "On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Id.*

108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988), which held that the erroneous denial of a challenge for cause that requires counsel to use a peremptory challenge does not create a Sixth Amendment violation. *See also United States v. Baker*, 10 F.3d 1374, 1404 (9th Cir. 1993). Because *Ross*, by its language, did not decide whether such an erroneous denial constitutes a Fifth Amendment violation, we ordered supplemental briefing.[2] We also relieved Martinez-Salazar's then-counsel and appointed new counsel.

B. Analysis

1. The District Court's Refusal to Exclude a Properly Cause-Challenged Juror

Martinez-Salazar claims that the district court should have excused juror Gilbert for cause because of his admitted bias in favor of the prosecution. We agree.

A juror is deemed impartial "only if he can lay aside his opinion and render a verdict based on the evidence presented in court. . . ." *Patton v. Yount*, 467 U.S. 1025, 1037 n. 12, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). Because the "'determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge,'" we do not disturb a district court's decision to deny a challenge for cause absent a showing of abuse of discretion or manifest error. *United States v. Egbuniwe*, 969 F.2d 757, 762 (9th Cir. 1992) (quoting *Ristaino v. Ross*, 424 U.S. 589, 595, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976)).

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[2] Martinez-Salazar's initial brief contains a claim that the district court's refusal to strike juror Gilbert for cause "force[d] [him] to use one of his preemptory [sic] strikes to remove Gilbert from the panel," but does not explicitly allege a Fifth Amendment violation.

"When a juror has stated that she can decide a case impartially," a district court does not abuse its discretion in not excusing him for cause. *United States v. Poschwatta*, 829 F.2d 1477, 1484 (9th Cir. 1987), *overruling on other grounds recognized by United States v. Powell*, 936 F.2d 1056, 1064 n. 3 (9th Cir. 1991). We have upheld a district court's decision not to dismiss for cause a juror who initially admits bias as long as he or she ultimately asserts an ability to be fair and impartial. *See, e.g.*, *United States v. Alexander*, 48 F.3d 1477, 1484 (9th Cir. 1995) (juror initially said he "believed" he could be impartial but ultimately stated definitively that he could act fairly); *Poschwatta*, 829 F.2d at 1484 (juror claimed impartiality despite strong feelings about excuses for failing to file tax returns); *United States v. Daly*, 716 F.2d 1499, 1507 (9th Cir. 1983) (juror initially said he would "try" to be impartial but ultimately stated, "Okay, I will do it").

The district court here should have excused juror Gilbert for cause because he did not and would not affirmatively state that he could lay aside his admitted bias in favor of the prosecution. Juror Gilbert clearly acknowledged this bias, even after being instructed by the district court that it was "contrary to our whole system of justice." He never retreated from his statement of bias; he only cryptically stated that he understood the presumption of innocence "in theory." The government's contrary assertions about juror Gilbert's statements are unsupported by the record.

2. Sixth Amendment

Initially, Martinez-Salazar claimed that the district court's refusal to excuse juror Gilbert constituted a Sixth Amendment violation. *Ross* forecloses this argument, however, holding that "[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." 487 U.S. at 88. Under *Ross*, because Martinez-Salazar's counsel eventually struck juror Gilbert with a peremptory challenge, he suffered no prejudice to his Sixth Amendment right to trial by an impartial jury. *See also Siripongs v. Calderon*, 35 F.3d 1308, 1322 (9th Cir. 1994); *Baker*, 10 F.3d at 1404.

3. Fifth Amendment

Martinez-Salazar's appellate counsel alleges that the district court's erroneous refusal to strike juror Gilbert for cause violated his Fifth Amendment right to due process by denying or impairing his right to the full complement of peremptory challenges to which federal law entitled him.[3] The relevant case law compels a decision in his favor.

a. The Violation

Over thirty years ago, the Supreme Court held that a denial or impairment of the right to exercise peremp-

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[3] In its supplemental brief and at oral argument, the government conceded that due process would be violated if Martinez-Salazar had to use a peremptory challenge to strike a juror who should have been stricken for cause. The government's position was that the district court had not erred in refusing to strike juror Gilbert for cause. We disagree, however, and independently conclude that the district court's decision violated Martinez-Salazar's Fifth Amendment right to due process.

tory challenges "is reversible error without a showing of prejudice." *Swain v. Alabama*, 380 U.S. 202, 219, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), *overruled in part by Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). When considering whether the loss of a peremptory challenge violates due process, *Ross* limits what constitutes a denial or impairment of the right of peremptory challenge.[4] *Ross* explained:

> Because peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. As such, the "right" to peremptory challenges is "denied or impaired" only if the defendant does not receive that which state law provides.

487 U.S. at 89, 108 S. Ct. 2273 (citations omitted). The Oklahoma law at issue in *Ross* entitled the defendant to nine peremptory challenges. Under that law, one of the required uses of a peremptory challenge was to "cure erroneous refusals by the trial court to excuse jurors for cause." *Id.* at 90, 108 S. Ct. 2273. Accordingly, the defendant in *Ross* did not lose any right conferred by state law when he expended one of the nine challenges to remove a juror that should have been excused for cause. *See id.* at 90-91, 108 S. Ct. 2273.

Ross, however, left open the possibility that a Fifth Amendment due process challenge could succeed if the

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[4] Because *Ross* involved an appeal of a state-court decision, the Court framed the issue as arising under the Due Process Clause of the Fourteenth Amendment. Martinez-Salazar's claim arises in federal court and hence is rooted in the Due Process Clause of the Fifth Amendment.

applicable law granting a defendant the right to exercise peremptory challenges did not require their use to cure erroneous refusals to remove jurors for cause. Specifically, the Court stated: "We need not decide the broader question whether, in the absence of Oklahoma's limitation on the 'right' to exercise peremptory challenges, 'a denial or impairment' of the exercise of peremptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been excused for cause." *Id.* at 91 n.4, 108 S. Ct. 2273.

We have twice revisited *Ross* but not answered this specific question. In Baker, we interpreted *Ross* to mean that "the due process 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive the full complement of challenges to which he is entitled by law." 10 F.3d at 1404. Because the defendants-appellants in *Baker* based their Fifth Amendment due process challenge on the district court's refusal to ask prospective jurors proposed supplemental questions, however, that case did not address the question of whether a federal defendant is denied the "full complement" when he is forced to use one of his peremptory challenges to cure an erroneous for-cause refusal. Moreover, we held that no due process violation occurred because the defendants were granted more challenges than they were entitled to under federal law. In addition, the opinion does not indicate whether the defendants used all allotted challenges. *See id.*

In *Siripongs*, we examined a defendant's claim that the trial court applied the wrong standard on voir dire to determine which venire members should be stricken for cause based on their views of the death penalty. We concluded that the defendant "failed to demonstrate

that any of the jurors actually empaneled were unduly prone to impose the penalty of death." 35 F.3d at 1322. We further stated:

> It is immaterial that [defendant] may have been required to use preemptory [sic] challenges to excuse jurors that the trial court would have excused for cause had it employed the proper standard. [Defendant] did not exhaust all of his preemptory [sic] challenges. Moreover, the loss of preemptory [sic] challenges is not a due process violation.

35 F.3d at 1322 (citing *Ross*, 487 U.S. at 88, 108 S. Ct. 2273).

We decline to apply literally and in all circumstances the statement that "the loss of [peremptory] challenges is not a due process violation." When, as in *Siripongs* and *Ross*, a state statute is involved, the answer may turn on the specific provisions of the statute. Like *Baker*, *Siripongs* did not reach the question whether due process is violated when a defendant is forced to exercise a peremptory challenge to cure an erroneous for-cause refusal. We think the above statement is best understood in the specific factual context of the case. The defendant in *Siripongs* could suffer no due process violation because he did not exhaust all of his peremptory challenges and hence this right was not "denied or impaired" in any way. Moreover, Siripongs alleged error under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed 2d 776 (1968), and *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), both Sixth Amendment cases. *Siripongs*, therefore, also does not answer the question left open by *Ross*.

More importantly, *Siripongs* cannot stand for the proposition that the loss of a peremptory challenge *never* violates due process because *Ross* and *Baker* make clear that some such losses do indeed violate due process. For example, due process would be violated if a trial court permitted a defendant to exercise fewer than the number of peremptory challenges authorized by law. Hence *Siripongs* holds only that the loss of a peremptory challenge *does not necessarily* violate due process.[5]

Martinez-Salazar's case presents precisely the question *Ross* left open. Martinez-Salazar was entitled to and received eleven peremptory challenges, and federal law does not require a defendant to exercise a peremptory in order to cure an erroneous refusal to strike a juror for cause.[6] Furthermore, Martinez-Salazar and his codefendant exhausted his eleven peremptories and had to use one of them to strike juror Gilbert.

Under these circumstances, we hold that Martinez-Salazar's Fifth Amendment due process rights were violated. Martinez-Salazar was entitled to use his peremptory challenges solely to strike those jurors who would not otherwise be excused for cause. The district court erroneously denied his for-cause challenge to

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[5] *Siripongs* and *Baker* are also panel decisions that pre-date the en banc decision in *Annigoni*. Although we attempt to harmonize them here, to the extent that either or both conflict with *Annigoni*, *Annigoni* must control. *See Campbell v. Wood*, 18 F.3d 662, 672 n. 2 (9th Cir. 1994) (en banc).

[6] A federal defendant can contest a decision to deny a for-cause challenge without first peremptorily striking the juror in question. *See United States v. Mobley*, 656 F.2d 988, 989-90 (5th Cir. Unit B Sept. 1981).

juror Gilbert, thereby forcing him to exercise one of his peremptories to achieve the same result.[7]

b. The Remedy

In *Annigoni*, we held that the erroneous denial of a defendant's right of peremptory challenge requires automatic reversal. *See* 96 F.3d at 1146-47. In that case, a trial court denied the defendant's peremptory challenge to a juror because it believed the challenge was racially motivated. We ultimately held: (1) the denial was erroneous because the defense offered a plausible explanation for the proposed peremptory challenge; and (2) the erroneous denial of a peremptory challenge is not subject to harmless-error analysis but requires reversal. *See id.*

While there is a difference between these facts and those in *Annigoni*—namely, the "offensive" juror did not serve on Martinez-Salazar's jury—the rationale applies equally here. Both involve the erroneous limitation of an essential right of a criminal defendant—the right to exercise non-discriminatory peremptory challenges without judicial interference. Prospective Juror Gilbert, remarkable if for nothing else but his candor, had no business sitting on this or any other criminal

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[7] We find no merit in the government's argument that Martinez-Salazar cannot claim *his* due process rights were violated because it is unclear which defendant actually exercised the peremptory to strike juror Gilbert. Rule 24(b) entitles defendants *jointly* to ten peremptory challenges. The government's position taken to its logical extreme would lead to inequitable results. For example, if three defendants were tried together and all three agreed to strike juror A, but defendant # 1 actually exercised the peremptory challenge, only he could secure a reversal of his conviction if an error requiring automatic reversal occurred during the jury selection process.

jury. Peremptory challenges are reserved for government and defense counsel alike to use as they see fit, as long as *Batson* and its progeny are observed. Therefore, following *Annigoni*, we hold that the district court's effective denial of Martinez-Salazar's right to his full complement of peremptory challenges requires reversal of his conviction.

REVERSED AND REMANDED.

RYMER, Circuit Judge, concurring in part and dissenting in part:

In creating a Fifth Amendment due process right that is abridged whenever a defendant uses a peremptory challenge to strike a juror who should have been excused for cause, the majority constitutionalizes a statutory problem, approaches the problem as if error had been preserved (which it wasn't), and accomplishes through the back door what *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed.2d 80 (1988), forecloses through the front. I therefore dissent.

In *Ross*, the Supreme Court held that "[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.* at 88, 108 S. Ct. 2273. Apart from the Sixth Amendment's guarantee of an impartial jury, there is no constitutional right to a peremptory challenge. *Id.* Because peremptory challenges are a creature of statute, the majority should not have gone beyond the Sixth Amendment in search of a constitutional basis for reversal.

Instead, this should be treated as an ordinary statutory question that could and should be resolved by ordinary statutory analysis. We have this case on

direct review of a federal criminal proceeding. We should, therefore, start with Rule 24(b) of the Federal Rules of Criminal Procedure, which is the source of the statutory entitlement to peremptories, and end with Rule 52, for "it is that Rule which by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case." *Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544, 1548, 137 L. Ed. 2d 718 (1997).

Rule 24(b) gives defendants jointly ten peremptory challenges (unless the court allows more, which it may do if asked). Martinez in fact got to exercise all of his peremptory challenges; he never objected that the district court denied him "the full complement of peremptory challenges to which he [was] entitled." *United States v. Baker*, 10 F.3d 1374, 1404 (9th Cir. 1993). Nor did he ask for an extra peremptory to compensate for the one that he decided to use on Gilbert, or object to using a peremptory for this purpose. Nothing suggests that he would have used *that* peremptory on anyone else. In short, we are left with no idea whether Martinez "wasted" a peremptory, let alone wanted to strike another venireman who was not to his liking (for a legitimate reason) but couldn't do so because he was out of challenges. What we do know is that Martinez let the jurors be sworn without questioning either their impartiality or the process by which they were impaneled.

Having failed to tell the district court that its procedures were contrary to Rule 24(b), or that his due process rights were adversely affected, Martinez forfeited any claim that he was deprived of the ten challenges he was jointly allowed under Rule 24(b). It is

well settled that failure to raise an issue in the district court waives the argument. Counsel are quite used to making a record during jury selection, and courts have ample discretion to respond.

Our review is therefore constrained by Rule 52(b), which we must apply as outlined in *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993).[1] *See Johnson*, 117 S. Ct. at 1548. *Olano* requires that "before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights." *Id.* at 1548-49 (citing *Olano*, 507 U.S. at 732, 113 S. Ct. 1770) (internal quotation marks omitted; alteration in *Johnson*).

Assuming that the district court erred in denying Martinez's challenge of Gilbert for cause,[2] it could not have been "plain" error to let Martinez use a peremptory to excuse the juror whom he had challenged for cause. This is so for at least three reasons. First, under *Ross*, using a peremptory to cure the trial court's improper failure to grant a challenge for cause does not violate a constitutional right without a showing of prejudice. Here, there is no dispute that the jury which was impaneled was impartial. Second, as the majority recognizes, we have never answered the specific question that it resolves today—whether there is a Fifth Amendment due process violation if the applicable law does not require use of a peremptory challenge to cure

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[1] The majority approaches the appeal as if Martinez preserved a Rule 24 error for review. He didn't, and the majority's analysis goes astray for this reason as well.

[8] I assume error in this respect because the majority finds there was error.

an erroneous refusal to remove for cause. So far as I know, no one else has, either. Thus, the law definitely was not clear at the time of trial, or now. Finally, nothing in *Ross* or Rule 24(b) itself suggests that the exercise of peremptories is "denied" if the defendant uses a challenge to strike a juror who should been excused for cause. Indeed, we distinguished *Ross* on precisely this footing in *United States v. Annigoni*, 96 F.3d 1132 (9th Cir. 1996) (en banc), indicating that "the [trial] court's erroneous denial of *Ross*'s challenge for cause prompted *Ross* to expend one of his peremptory challenges to remove the questionable juror [but] it *never deprived him* of the right of peremptory challenge." *Id.* at 1146 (emphasis in original). As the statutory violation was waived, we don't have to decide whether Martinez's statutory right to ten jointly exercised challenges was "impaired," nor do we have to decide whether automatic reversal remains the remedy for statutory error. *See Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *cf. Annigoni*, 96 F.3d at 1147 (rejecting harmless-error analysis for the erroneous denial of a peremptory challenge). Since no plain error appears, that's the end of this case so far as I am concerned.

Martinez's failure to preserve and pursue the available avenue of relief for violation of his statutory rights gives this court no license to make the Due Process Clause a default analysis. The Supreme Court has said over and over that "peremptory challenges are not of constitutional dimension." *Ross*, 487 U.S. at 88, 108 S. Ct. 2273 (citing *Gray v. Mississippi*, 481 U.S. 648, 663, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987)); *see Swain*, 380

U.S. at 219, 85 S. Ct. 824; *Stilson v. United States*, 250 U.S. 583, 586, 40 S. Ct. 28, 63 L. Ed. 1154 (1919); *see also* (after *Ross*) *Georgia v. McCollum*, 505 U.S. 42, 57, 112 S.Ct. 2348, 120 L. Ed. 2d 33 (1992); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991). Rather, "[t]hey are a means to achieve the end of an impartial jury." *Ross*, 487 U.S. at 88, 108 S. Ct. 2273. That end was indisputably achieved in this case. To find a due process violation for "effectively" denying or impairing Martinez's "right to the full complement of peremptory challenges to which he was entitled under federal law," as the majority does, maj. op. at 659, comes full circle by "effectively" making the exercise of a peremptory challenge a *constitutional* right—and a right, at that, whose dilution requires automatic reversal.

Constitutionalizing the impairment of peremptory challenges is not inconsequential. Trial courts, state and federal, rule on cause challenges by the minute. A statutory violation (state or federal) may well require reversal if the defendant has exhausted his peremptories by striking a juror he unsuccessfully challenged for cause; but there is no reason why the door should be open to review of state or federal *statutory* violations for *constitutional* error that can never be treated as harmless.

I would not have reached the issue the majority decides. I would not convert a violation of Rule 24(b) (assuming there was one) into a constitutional violation, and I would not engraft a common law remedy of per se reversal for a Rule violation (assuming it survives *Ross*) onto the Due Process Clause of the Fifth Amendment. I therefore dissent from Part II.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-10158

D.C. No. CR-93-00284-EHC
(DISTRICT OF ARIZONA)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTONIO MARTINEZ-SALAZAR,
DEFENDANT-APPELLANT

[Filed: Oct. 7, 1998]

ORDER

Before: REINHARDT, RYMER and HAWKINS, Circuit Judges.

A majority of the panel voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Rymer voted to grant the petition and to accept the en banc suggestion.

The full court was advised of the suggestion for rehearing en banc. An active Judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.